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IN THE

Supreme Court of the United States

October Term, 1967

No. 360

HOFF RESEARCH & DEVELOPMENT LABORATORIES, INC.,

Petitioner,

vs.

PHILIPPINE NATIONAL BANK and PHILIPPINE NATIONAL BANK, NEW YORK AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Supreme Court of the United States:

Hoff Research & Development Laboratories, Inc., the petitioner herein, prays for a writ of certiorari to review the final order of the Court of Appeals of the State of New York, made on the 18th day of April, 1967.

The Opinion Below

The opinion of the Supreme Court of the State of New York, County of New York, was unofficially published in the New York Law Journal, dated March 3, 1966. A copy of such opinion is annexed hereto and designated as Exhibit "A".

The affirmance of the order of the Supreme Court, New York County, by the Appellate Division of the Supreme

Court, First Judicial Department, was reported without opinion in 26 App. Div. 2d 992.

The denial by said Appellate Division of petitioner's motion for reargument or, in the alternative, for leave to appeal to the Court of Appeals of the State of New York, was not reported.

The denial by the Court of Appeals of petitioner's motion for leave to appeal to such Court from the order of affirmance of the said Appellate Division is reported in 19 N. Y. 2d 582.

Jurisdiction

The final order of the Court of Appeals of the State of New York was made on April 18, 1967, a copy thereof being annexed hereto as Exhibit "B".

No application has been made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Rule 19 of the Revised Rules of the Supreme Court and Title 28 U. S. C., sections 2101 (c) and 2104, on the ground that review by the Supreme Court of the United States by writ of certiorari is sought of an order and judgment entered after the denial of due process of law guaranteed under the Constitution of the United States. Certiorari is sought on the ground that the said Court of Appeals and its courts below have decided an important federal question of substance not heretofore determined by this court and/or has decided the same in a manner probably not in accord with the applicable decisions of this Court.

Provision of the Constitution of the United States in Point

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any persons of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York Statute Involved

Rule 3212 of the Civil Practice Law and Rules

Rule 3212. Motion for summary judgment.

(a) **Time; kind of action.** Except as provided in subdivision (d) with respect to a matrimonial action, any party may move for summary judgment in any action, after issue has been joined.

(b) **Supporting proof; grounds; relief to either party.** A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently

to warrant the court as a matter of law in directing judgment in favor of any party. The motion shall be denied if any party shall show facts sufficient to warrant a trial of any issue of fact other than an issue as to the amount or the extent of the damages. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

(c) Triable issue of fact as to damages. * * *

(d) Matrimonial actions. * * *

(e) Partial summary judgment; severance. * * *

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that the facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had or may make such other order as is just.

(g) Limitation of issues of fact for trial. * * *

The Questions Presented for Review

1. Is the due process clause of the Fourteenth Amendment of the United States Constitution violated where a court grants summary judgment dismissing a complaint basing its conclusion upon the existence of a fact negated by written admissions of the party asserting such fact?

2. Is the due process clause violated where a court's conclusion of the absence of issues of fact stand unsupported by the record before it?

3. Has petitioner been deprived of his property without due process of law when, by summary judgment, he

has been denied a hearing of issues of fact where, although disputed facts and admissions were contained in the record before it, a court, in disregard of the issues of fact, determined the issues as a matter of law.

4. In having denied leave to appeal from the order of affirmance of the Appellate Division, First Judicial Department, did the Court of Appeals of the State of New York make an order depriving petitioner of his property without due process of law.

The Facts Necessary to a Consideration of the Questions Presented

The motion papers reveal the following:

Prior to August, 1961, plaintiff was engaged to construct a cement plant in the Philippine Islands for Clep Cement Corporation. In connection with that project, negotiations were had between plaintiff and defendants for the issuance of two letters of credit, one for $553,000 (hereinafter called the smaller letter) and one for $6,003,506.25 (hereinafter called the larger letter of credit).

During the negotiations, defendants desired that the sum of $900,000 be deposited to the credit of Clep with Philippine National Bank (hereinafter called PNB), in Manila. To meet that requirement, plaintiff entered into an arrangement with Nederlandsche Handel-Maatschappij to secure such sum. In turn, Nederlandsche, on August 7, 1961, wrote to PNB advising that it had set aside the specified amount in a special fund, which sum it would release upon the fulfillment of the following specified conditions (37, 38):*

* Numbers in parentheses refer to page numbers in Record on Appeal to Appellate Division of the Supreme Court (A2-A86 of Certified Papers).

"1. An irrevocable, divisible, and assignable letter of credit [will be] has been issued by you for account of Clep Cement Corporation in favor of Hoff Research & Development Laboratories, Inc., Cleveland, Ohio and has been confirmed by one of the following New York banks:

First National City Bank of New York

The Chase Manhattan Bank

Chemical Bank New York Trust Company

Irving Trust Company

Morgan Guaranty Trust Company

for the sum of U. S. $6,556,506.25 payable from date of letter of credit against negotiable drafts in accordance with the following schedule:

	Maturity	Total
1.	Sight	$ 553,000.00
2.	12 months	400,233.75
3.	18 months	459,543.00
4.	24 months	450,418.50
5.	30 months	441,294.00
6.	36 months	432,169.50
7.	42 months	423,045.00
8.	48 months	413,920.50
9.	54 months	404,796.00
10.	60 months	395,671.50
11.	66 months	386,547.00
12.	72 months	377,422.50
13.	78 months	368,298.00
14.	84 months	359,173.50
15.	90 months	350,049.00
16.	96 months	340,924.50
		$6,556,506.25"

On September 5, 1961, PNB issued the two letters. As a condition to negotiability of the smaller letter, it was provided that the said deposit of $900,000 would have to be made (15-19). On September 6, 1961, (unilaterally,) the bank amended the larger letter of credit to provide that its negotiability was conditioned upon the deposit required under the smaller letter. The amendment provided, also (20):

> "This Credit may be confirmed by either First National City Bank of New York, The Chase Manhattan Bank, Chemical New York Bank, Irving Trust Company, or the Morgan Guaranty Trust Co."

The letter of credit was never confirmed as indicated by said amendment. None of the banks would confirm the letter and written demands to defendants to arrange for the confirmation went unheeded (59, 60). Because the letter could not be confirmed, Nederlandsche withdrew from the deal and plaintiff could not acquire the $900,000 from them (20).

It was subsequently learned from defendants' own records that the bank had refused to place compensating balances with the New York banks indicated so that the letter could be confirmed by them. Roman G. Azanza, on behalf of the Agency Bank wrote the home office as follows, on February 15, 1962 (45-47):

> " 'Head Office went ahead opening several deferred payment letters of credit without letting us know of the plan. The project had to be suspended eventually *because American banks were reluctant to confirm such* credits, except on a fully accrued basis, *the reason being that Federal Reserve Bank regulations do not countenance a bank commitment*

to discount drafts beyond twelve months at most. A good case in point is that of Clep Cement Corporation.

L/C 613369-FM, *expired* Nov. 4, 1961 for $553,000.00 and L/C 613370-FM *expiring in 8 years for* $6-million odd. The Credits require that a deposit of $900,000.00 be made with New York Agency before *either of them* can be negotiated. Neither Hoff, the beneficiary, nor Clep, the importer, was able to put up this deposit nor get anyone else to put up such a deposit. No American bank was willing to confirm the 8 year Credit unless *a compensating or pledged deposit balance was lodged. President Romualdez specifically ordered us not to pledge PNB funds for the purpose.* Head Office ordered New York Agency to confirm the 8-year Credit and immediately the beneficiary and his prospective suppliers tried to bear pressure on us (even though they did not put up the $900,000.00 deposit) to agree to discount at once the 8-year Credit. *Later on* Head Office directed that the 8-year Credit 'may be confirmed' by designated New York banks, and we were pressured into so doing. President Romualdez supported our stand that the beneficiary himself should shop around and stand on his own credit rating and that PNB should not pledge its funds..

• • •

'This should have brought home the point to the Head Office that *it should not encourage the opening of deferred payment L/Cs on a confirmed basis unless PNB is prepared to discount in full the long-term Credit or unless it is willing to pledge its own funds to an American confirming bank because con-*

firmation entitles the beneficiary to demand the discount of the acceptances created. My understanding is that Central Bank tolerated the opening of deferred payment credits on the clear understanding that payments would be made by installments but this policy is defeated when the credit is confirmed for the full term and the beneficiary cleverly takes umbrage in the business practice of discounting the confirmed credit in advance, which actually amounts to selling on cash or sight L/C basis.

"* * * * The 8 year confirmed credit is also useless unless somebody puts up the $900,000.00 deposit all over again.' " (Emphasis supplied.)

In passing, in his letter, Mr. Azanza noted:

"Your Foreign Department records should show that the Nederlandsche Handel Maatschappij, N. V., N. Y., communicated with that Head Office directly or through us on August 7th and August 24th explaining the rigid conditions under which they undertook to deposit $900,000 with NY Agency on behalf of Hoff. *We understand that Nederlandsche did not receive any reply from HO concerning these proposals. Nevertheless, HO opened these two letters of credit on 9/5/61 requiring a deposit from Nederlandsche Bank of $900,000.00,* the prerequisites of which Hoff could not meet any way." (Emphasis supplied.)

The writer concluded by observing:

"* * * * The question now is—what will PNB do about '*irrevocable, confirmed*' L/C 613370-FM which

> will expire in the year 1969? In irrevocable credits, no change or cancellation is possible without consent of the four parties involved: the importer, the exporter, the Manila bank, and the bank abroad."

Without knowledge that its deal was being blocked, and in a further attempt to make the required deposit, plaintiff entered into an arrangement with The Chartered Bank and Bank of America whereby $900,000 would be deposited with PNB upon the understanding that Clep was to cause certain peso deposits to be made to the accounts of said banks at PNB, Manila. In the event that the deposits were not made, the $900,000 was to be returned to said banks, however (40).

Immediately upon delivery of its $900,000 to defendant Agency, the banks issued a check for $553,000 to The Chartered Bank, which check represented the negotiation of the smaller of the letters of credit. Because the peso deposits were not made, eventually, PNB refunded $347,000 (the difference between $900,000 and $553,000) to The Chartered Bank (41).

In the affidavits seeking summary judgment, defendants maintained that the letters of credit expired upon the making of that refund. They set forth the date of December 11, 1961 as being such expiry date (13).

Although the defendants took the position on their motion that the letters of credit had expired in December, 1961, their documented action indicated otherwise. On January 25, 1962, the President of PNB wrote that its Agency had permitted the smaller letter to be negotiated "on its responsibility" (43) and acknowledged (44):

> "Despite the fact that CLEP is a poor risk, however, the Bank presently stands committed to that cor-

poration by virtue of the opening of Irrevocable Stand by L/C 613370-FM for $6,003,506.25, *which will not expire until Sept. 3, 1969.*" (Emphasis supplied.)

Subsequent bank memoranda acknowledged that the smaller letter had been negotiated and that the bank stood committed upon the larger letter until September, 1969. In the material Azanza document it was admitted that the larger letter did not expire in December, 1961 (47) and the writer observed that the larger letter would become useful once "somebody puts up the $900,000 deposit all over again" (46).

Other bank memoranda reveals that plaintiff was informed that it could claim the benefits of the larger letter by making the $900,000 deposit. In what has been termed as the "blueprint for chicanery", on October 13, 1962, an Assistant Vice President and Manager of the Foreign Department, C. Batusta, wrote a memorandum to his Board of Directors (47-49).

> "Granting, however, that L/C 613369-FM ($553,000) has been fully negotiated, L/C 613370-FM as *opened will expire on September 5, 1969.* As provided for in this L/C, first drawing may be made after complete shipment of the goods ordered but not earlier than six (6) months from the date of commencement of shipment *so that if shipments were to be started immediately, the first drawing against this letter of credit cannot be made earlier than April 1963 and the last two (2)* drawings *will have to fall beyond the expiry date of the L/C.* These last two drawings amount to $690,973.50. Unless amended, therefore, or extended, the chances are

that the *beneficiary* of the letter of credit may not take advantage of this L/C. And if shipments will have to be prolonged, since manufacture of the equipment called for has to be started before shipment can be started, in all likelihood there will be more than two (2) installments that will have to fall beyond the expiry date of the credit.

It has always been the stand of management in this case that the Bank will be better off if this transaction is not pushed thru. In line with this attitude of the Management with respect to these letters of credit, we outline below possible courses of action that the Bank may take to *stop the negotiation or to discourage at least the beneficiary from pushing thru this transaction.*

(1) Consider L/C No. 613369-FM ($553,000) as unnegotiated and expired. Since negotiation of L/C No. 613370-FM is dependent upon negotiation of L/C No. 613369-FM, L/C 613370-FM cannot therefore be negotiated. In this connection *however,* we wish to point out that the parties concerned were *made* to believe that by *putting up a deposit of $900,000 with our New York Agency, the beneficiary of L/C 613370-FM may be able to negotiate said L/C.*

(2) If by virtue of the Bank's action to make the parties *believe* that L/C 613370-FM may still be negotiated upon deposit of $900,000. if we have to continue with this letter of credit, the bank may insist on the present expiry date and the cash deposit of $900,000. In other words, all parties concerned *including the beneficiary,* will be warned that PNB will not al-

low any amendment whatsoever." (Emphasis supplied.)

At this point, the time sequence became material for, in early September, 1962, one Samuel H. Gray contacted PNB and inquired as to the status of the letters, he being ready at that time to deposit the requested $900,000. Because he could not get a straight answer as to whether the bank intended to stand behind its aforesaid representations to accept the $900,000 at any time prior to September, 1969, Gray personally went to the Philippines. There he learned from the head of the Foreign Department that "he would always find a condition to keep the deal from going through and that he would block it" (Gray affidavit, 69-71).

Gray was in Manila during the first week of October, 1962.

Additionally, on October 12, 1962, one day before Batusta memorandum, the bank billed CLEP a sum "(r)epresenting confirmation charge for two periods (3/5/62 to 9/4/62) in connection with your L/C No. 613370-FM amounting to $6,003,506.25 (63). This sum is claimed by the banks to have been subsequently refunded to CLEP.)

It was only after Batusta had unfolded his scheme that the banks altered their previous commitments and took on a position of denial.

At no point in the moving papers (including the reply affidavit) did defendants make any comment concerning their post-December, 1961 representations, aforesaid. They ignored the pointed and documented accusations as though the same did not exist in the opposing papers. They stood silent as to such matters on the appeal.

The record reveals that the bank never indicated to plaintiff the date on which it claimed the letters to have expired; although it wrote requesting such information (64-67).

On this motion for summary judgment, plaintiff documented admissions indicating issues of waiver and estoppel sufficient to bar the bank from denying the effects of their avowed representations. The courts below held, *as a matter of law,* that issues of fact did not exist herein.

Manner in Which Federal Questions Sought to Be Reviewed Were First Raised

The federal questions sought to be reviewed were first raised on the motion made for reargument of the appeal from the order of the Supreme Court, New York County, or, in the alternative, to appeal from the order of affirmance of the Appellate Division to the Court of Appeals.

In the brief of plaintiff-appellant [petitioner herein], it was submitted (p. A113 of the Certified Papers in the Appellate Division):

> "It is respectfully submitted that in the face of such most compelling admissions contained in documents emanating from respondents the affirmance of this Court is without foundation in law. It is much akin to the observation of Black, J., in *Thompson* v. *Louisville,* 362 U. S., 199, wherein he wrote, at page 206:
>
> > '• • • Just as "Conviction upon a charge not made would be sheer denial of due process," so it is a violation of due process to convict and punish a man without evidence of his guilt.'

> It is submitted that the court below, and the affirmance of this court, is a 'sheer' denial of due process as guaranteed under the Constitution of the State of New York and Constitution of the United States where admissions of wrongdoing are swept aside and a summary judgment is given the effect of which is to deny a forum for the airing of such wrongdoing."

On its motion to appeal to the Court of Appeals from the order of affirmance of the Appellate Division, plaintiff-appellant [petitioner herein] argued in the Court of Appeals (p. 24 of the Certified Papers in the Court of Appeals):

> "The uncontroverted facts having been ignored by the courts below, appellant was deprived of its constitutional right to due process of law and to a day in court as guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of this State. Defendants did not even offer a token reply to their condemning admissions. (See *Society Milion Athens, Inc.* v. *National Bank of Greece,* 166 Misc. 190, affd. 253 App. Div. 650.)
>
> Having ignored the inescapable facts, the courts below acted akin to the admonished tribunal in *Thompson* v. *Louisville,* wherein Black, J. wrote (206):
>
> '* * *. Just as a 'Conviction on a charge not made would be a sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt.'
>
> Conversely applied to the matter at bar, it is submitted that to ignore the existence of uncontroverted

> facts to the extent that a party is denied a day in court thereby, is as much a denial of due process as a finding without facts to support the same."

The constitutional question could not be raised in the first court inasmuch as the problem of due process did not arise until the matter came into the appellate courts. The problem became apparent upon the affirmance by the Appellate Division and the sought reargument of the appeal was timely brought.

Argument Relied Upon for Allowance of the Writ

The provisions of Rule 3212, *Civil Practice Law and Rules, supra,* provide a constitutional method for summary judgment without the abridgement of the protections of due process of law. It is the built in check-valve providing that where an issue of fact is demonstrated a trial must be had which renders the statute acceptable.

New York has recognized its duty, and its Court of Appeals has declared that where an issue of fact is either fairly arguable or even debatable, summary judgment must be denied (*Falk* v. *Goodman,* 7 N. Y. 2d 87, 91; *Stone* v. *Goodman,* 8 N. Y. 2d 8).

This Court, in *Thompson* v. *Louisville,* 362 U. S. 199 has declared that depriving one of liberty upon conviction of a crime where, in fact, no crime was ever committed is violative of due process.

It is petitioner's position that a "sham" civil determination effective to deprive one of property is as much a constitutional outrage as an empty criminal judgment.

It has been held that matters of evidence are not usually subjects for review by this Court. However, in *Grundler*

v. *State of North Carolina* (C. A. 8th Circ.), 283 Fed. 2d 798, 802, we were reminded:

> "• • • Normally, the admissibility of evidence, the sufficiency of evidence and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented."

It is submitted that the courts of New York impugned fundamental fairness in the matter at bar.

The Supreme Court, New York County, granted judgment dismissing the complaint upon the sole finding that the letters of credit sued under had expired and become inoperative on December 11, 1961 because petitioner had not deposited a specified sum required by its terms.

In arguing against the movants' position, petitioner, below, brought forth documents executed under defendants' own hand wherein it was admitted that the larger letter of credit would not expire until September 3, 1959. The banks acknowledged the position:

> "• • • In irrevocable credits, no change or cancellation is possible without consent of the four parties involved: the importer, the exporter, the Manila bank and the bank abroad."

On January 25, 1962, the president of the Manila bank took the position, in writing:

> "• • • the Bank stands committed to that corporation by virtue of the opening of Irrevocable Stand

by L/C613370-FM for $6,003,506.25, which will not expire until Sept. 3, 1969."

In a document written by C. Batusta, a Vice President of the Manila bank on October 13, 1962, he remarked:

> "* * * we wish to point out that the parties concerned *were made to believe* that by putting up a deposit of $900,000 with our New York Agency, the beneficiary of L/C 613370-FM may be able to negotiate said L/C." (Emphasis supplied.)

It was this same Batusta who suggested that the bank should "*make the parties believe*" that by depositing the required $900,000 the larger letter of credit could be negotiated, but that the negotiations should be made unpalatable by a refusal to extend the September, 1969 expiry date.

It is submitted that the New York courts involved in this matter sealed their collective eyes to the written words of the movants and in complete and utter disregard thereof found a fictitious fact upon which to turn its decision.

It is as though the New York courts were of a singular mind to decree a dismissal of the complaint no matter what the facts were before it. This becomes even more emphatic when one notes that movants never commented upon their admissions as set forth in petitioner's opposing papers. There is a complete absence of reply.

It is submitted that unless facts to support a conclusion exist, the conclusion becomes an arbitrary adjudication. Such is the case at bar.

The Supreme Court does not appear to have ever commented upon the matter at bar. While there may be criminal parallels among the decisions, this Court has not extended its rulings to the civil side of the law.

Petitioner having been deprived of his property by an arbitrary ruling was, simultaneously, deprived of its constitutional right to due process of law. The petition should be granted.

Respectfully submitted,

ARNOLD DAVIS,
Attorney for Petitioner.

EXHIBIT "A"

Opinion by Gavagan, J.

Reported in New York Law Journal, March 3, 1966

Hoff Research & Development Laboratories, Inc. v. Philippine Nat. Bank—Defendants move for summary judgment dismissing the complaint. The action rests on two Letters of Credit. The second was issued to become operative upon fulfillment of conditions attached to the first which conditions defendants insist were not fulfilled. In a first cause plaintiff alleges defendants did not open the letters of credit as agreed. In a second cause plaintiff alleges the first letter was opened and defendants retained the proceeds thereof belonging to plaintiff. In the third cause it is alleged that the second letter was opened and defendants refused to honor it. The Material basic and operative facts are not disputed. The question presented is whether defendants refused to honor letters of credit which were unconditionally opened. It appears clearly that the requested funds to be supplied as a firm deposit for financing the letters in pursuit of the conditions as provided by the first letter were not furnished. The conditions in respect to the first letter were demanded by the bank procured on behalf of plaintiff to confirm the letters which was to make a firm deposit with the defendants. It made such deposit and required that a cash deposit be made available to it. It was this cash deposit which was not procured. Thereby the first letter did not become operative and it did expire and thereby the second letter never became operative. Subsequent efforts were made to revive the letters and these too, failed. There is nothing in the record which bound the defendants to honor the letters. The return to the confirming bank of the conditional deposit made by it with the defendants upon failure of the plaintiff to procure a cash deposit available to the confirming bank affords no basis for complaint. The motion is granted. Settle order.

EXHIBIT "B"

Order of Court of Appeals of the State of New York Denying Leave to Appeal Thereto

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighteenth day of April A. D. 1967.

Present,
HON. STANLEY H. FULD,
Chief Judge, presiding.

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1 Mo. No. 246

HOFF RESEARCH & DEVELOPMENT LABORATORIES, INC.,
Appellant,

vs.

PHILIPPINE NATIONAL BANK and PHILIPPINE NATIONAL BANK, NEW YORK AGENCY,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs.

A copy

/s/ G. KIMBALL
Deputy Clerk

[SEAL]